

**DECISION**



12210 D. Zivian  
Proc II  
**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D.C. 20548

FILE: B-195823

DATE: December 6, 1979

MATTER OF: E-Z Tight, Inc. D 3459

DIGEST:

Set-Aside  
[Protest of IFB Cancellation]

In protest involving 8(a) procurement, bad faith is not shown merely by fact that procurement was set aside one day prior to bid opening. However, in future cases bidders should be put on notice of possible withdrawal of procurement for 8(a) purposes as soon as procuring agency learns of SBA's interest and bid opening should be postponed or suspended to allow time to resolve set-aside question.

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2 E-Z Tight, Inc. (E-Z Tight) protests the decision by Department of the Army, Corps of Engineers (Army) to cancel invitation for bids (IFB) No. DACA45-79-B-0098, and to set aside the procurement for a minority contractor under the Small Business Administration's (SBA) 8(a) program. E-Z Tight contends that Government officials acted in bad faith in canceling the original invitation one day before bid opening and setting aside the requirement for minority business. For the reasons that follow, the protest is denied. 305

Section 8(a) of the Small Business Act (15 U.S.C. § 637(a), as amended by Pub. L. 95-507, October 24, 1978, 92 Stat. 1757), authorizes the SBA to enter into contracts with any Government agency having procurement powers. The SBA is empowered to select specific procurement contracts in which it certifies that 8(a) program participants are competent to perform. The contracting officer of the procuring agency is authorized to let the contract to SBA upon such terms and conditions as may be agreed upon between the SBA and the procuring agency. 53 Comp. Gen. 143 (1973). Therefore, we have recognized that the

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determination to cancel a competitive solicitation and initiate a set-aside under section 8(a) is a matter for the contracting agency and the SBA to decide. Echols Electric, Inc., B-194123.2, April 6, 1979, 79-1 CPD 242. In view of the broad discretion vested in the contracting officer and the SBA, we do not review determinations to set aside a procurement under section 8(a) unless it appears that there was fraud on the part of Government officials or such willful disregard of the facts as to necessarily imply bad faith. Arcata Associates, Inc., B-195449, September 27, 1979, 79-2 CPD 228; American Laundry, 58 Comp. Gen. 672 (1979), 79-2 CPD 49; Arlandria Construction Co., Inc., B-195044, July 5, 1979, 79-2 CPD 10.

3                    Although E-Z Tight alleges that the Army and the SBA acted in bad faith by canceling the competitive solicitation one day before bid opening, and that this action has caused it to incur substantial bidding costs, we do not find any evidence of bad faith by Government officials. The record indicates that this procurement initially was advertised as a small business set-aside. After bids were opened the low apparent bidder was permitted to withdraw its bid because of a mistake and the solicitation was canceled because the other bids, including the protester's bid, were considered unreasonably high. The requirement was readvertised on an unrestricted basis. Within a few days the SBA requested reservation of the procurement for its 8(a) program. Because the Army requested further information regarding the capabilities of the firm proposed by SBA to perform the required work, the competitive solicitation was not withdrawn until one month after issuance and E-Z Tight did not receive notice of the cancellation until the day before bid opening. 2

The Interagency Agreement between the Army and the SBA, Attachment No. 1, Section III, paragraph A(2) provides that "[i]n order to permit DA the maximum amount of time for planning, the SBA will endeavor to provide the reservation request at the earliest practicable date in advance of the anticipated requirement." Although

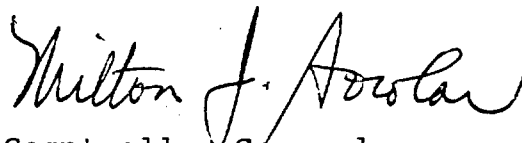
the withdrawal of the competitive solicitation was delayed until just prior to bid opening, we note that the SBA did request the reservation of the procurement soon after the cancellation of the initial small business set-aside and the issuance of the unrestricted procurement. It was only because the Army found it necessary to obtain further information on the proposed 8(a) firm that the IFB was not canceled sooner.

In appropriate circumstances it is not improper for an agency to prepare for or even conduct an unrestricted procurement while discussions are taking place with a potential 8(a) subcontractor. Arcata Associates, Inc., supra; Alpine Aircraft Charters, Inc., B-179669, March 13, 1974, 74-1 CPD 135. We think such circumstances clearly existed here, and that the facts do not support the allegation of bad faith. However, we recommend that in future cases bidders be put on notice of the possible withdrawal of the procurement for 8(a) purposes as soon as the procuring agency learns of SBA's interest. Also, bid opening should be postponed or suspended to allow time to resolve the set-aside question. This will help prevent potential bidders from incurring bidding costs unnecessarily.

E-Z Tight also points out that the 8(a) set-aside will create a significant financial hardship for the firm. In recognizing the validity of the 8(a) program, however the courts have noted that it will necessarily operate to the disadvantage of non-eligible small business concerns to some extent. Ray Baillie Trash Hauling, Inc. v. Kleppe, 477 F. 2d 696 (5th Cir. 1973). This monetary detriment to a non-eligible firm does not affect the validity of the 8(a) program or of a specific set-aside. Delphi Industries, Inc., B-193212, November 9, 1978, 78-2 CPD 336. We do recognize that as a matter of policy the SBA may find a procurement unsuitable for the 8(a) program based upon a finding that a small business concern may suffer a major hardship if the procurement is removed from competition. See SBA's Standard Operating Procedures (SOP) guideline (4).

This is a matter within the province of SBA and is not reviewed by this Office under the Bid Protest Procedures, 4 C.F.R. Part 20 (1979). Delphi Industries, Inc. -- Reconsideration, B-193212, January 30, 1979, 79-1 CPD 70.

The protest is denied.

A handwritten signature in cursive script, reading "Milton J. Avoian".

For The Comptroller General  
of the United States